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Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1693

UNITED STATES OF AMERICA, *Petitioner*,

v.

GLEN M. CLARKE, et al., *Respondents*.

On Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR BERTHA MAE TABBYTITE

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BRIEF FOR BERTHA MAE TABBYTITE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 590 F.2d 765. The opinion of the district court (Pet. App. 8a-10a) is unreported. The opinion of the court of appeals on a previous appeal (Pet. App. 11a-15a) is reported at 529 F.2d 984. The district court's prior opinion (Pet. App. 16a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on January 15, 1979. By order of April 10, 1979, Mr. Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 10, 1979. The petition was filed on May 10, 1979 and granted on October 1, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of . . . property, without due process of law. . . .

3(a). The first paragraph of Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1083-1084, 25 U.S.C. 319, provides:

> That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or

> for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: Provided, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

(b) The second paragraph of Section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 357, provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

(c) Section 4 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084, 25 U.S.C. 311, provides:

> That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

4. The Act of February 5, 1948, 62 Stat. 17, the first six sections of which are codified as 25 U.S.C. 323-328, provides:

> The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual

> Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.
>
> Sec. 2. No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967), shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indians if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.
>
> Sec. 3. No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

Sec. 4. This Act shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.

Sec. 5. Rights-of-way for the use of the United States may be granted under this Act upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

Sec. 6. The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act.

Sec. 7. This Act shall not become operative until thirty days after its approval.

5. Pertinent provisions of the condemnation laws of the State of Alaska and of the United States are set forth in Appendix B to this Brief.

QUESTION PRESENTED

Whether 25 U.S.C. 357 authorizes a state or local government to "condemn" allotted Indians lands for a highway right of way by physical occupation.

STATEMENT

The United States brought this action on behalf of Bertha Mae Tabbytite, an Indian trust allottee, to enjoin defendants from trespassing on the Tabbytite allotment and to recover damages. Tabbytite intervened and is separately represented. Following adverse

decisions by the district court and the court of appeals, the United States petitioned for certiorari. Tabbytite filed a Brief supporting the Petition.

Though a respondent [Supreme Court Rule 21(4)], Tabbytite files this Brief joining the petitioner in urging reversal of the judgment of the court of appeals. Tabbytite adopts the statements of the case and the arguments set forth in the Brief of the United States. The arguments presented in this Brief are confined to matters not included in the Brief of the United States.

SUMMARY OF ARGUMENT

1. Section 357 does not authorize the acquisition of highway rights of way across allotted Indian lands by condemnation or by physical seizure because that subject is governed by a more specific provision of the same enactment, 25 U.S.C. 311. Section 311 would also be rendered insignificant and its protective provisions would easily be defeated if highway rights of way could be acquired by condemnation. Effect can be given to both Section 311 and Section 357 by limiting Section 357 to the acquisition of interests in allotted Indian lands that are not covered by more specific statutes. And the ambiguity on the face of the statute that includes both Sections 311 and 357 should be resolved in favor of the Indians, particularly in the absence of any indication of a contrary legislative intent.

2. For the same reasons, the acquisition of rights of way across Indian allotted lands should be governed by the 1948 Indian Right of Way Act, 25 U.S.C. 323-328, to the exclusion of Section 357. Further, a provision of the 1948 Act expressly saved certain other laws from repeal, but there was no mention of Section 357. And

since the policies underlying Section 357 were subsequently repudiated by Congress, the Court should adopt a construction of the two statutes that implements the objectives of the more recent legislation.

3. The applicability of Section 357 to the acquisition of highway rights of way across allotted Indian lands has remained an open question in this Court since *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939). Even though the issue was not argued below, it is fairly encompassed within the question presented in the Petition and should be reached and resolved on the merits now in order to avoid even further prolongation of this 20 year dispute and decade of litigation. No useful purpose would be served by pretermitting the issue since the court of appeals has already passed on the question in another case.

4. By dispensing with notice and not providing an opportunity to be heard, governmental takings of private property by physical seizure constitute a flagrant denial of the procedural due process guarantees of the Fifth and Fourteenth Amendments. While actual, personal notice is not mandatory under all circumstances, in this case there is no justification for exercising the power of eminent domain by physical occupation. By refusing to institute judicial condemnation proceedings, Anchorage has effectively denied Tabbytite's right under Alaska law to challenge the authority, necessity and extent of the alleged taking and to protect herself against governmental mista[illegible]nd overreaching.

The constitutional issue can and should be avoided by excluding takings by physical seizure from the authority conferred by Section 357.

While this Court and the Congress have been careful to discourage takings by seizure, the decisions below provide substantial incentives for governments to dispense with condemnation proceedings. In light of its overriding obligation to deal fairly with Indians, Congress should not be presumed to have intended to authorize the taking of Indian property without providing for notice or an opportunity to be heard.

ARGUMENT

I. HIGHWAY RIGHTS OF WAY ACROSS ALLOTTED INDIAN LANDS ARE NOT SUBJECT TO JUDICIAL CONDEMNATION

The question presented in this case is whether a highway right of way through the Tabbytite allotment can be obtained pursuant to the second paragraph of Section 3 of the 1901 Indian Appropriations Act, codified as 25 U.S.C. 357. Tabbytite answers that question in the negative because, *inter alia,* the acquisition of highway rights of way through Indian allotted lands is governed exclusively by two other statutes, Section 4 of the 1901 Indian Appropriations Act, codified as 25 U.S.C. 311, and the 1948 Indian Rights of Way Act, codified as 25 U.S.C. 323-328.

A. Section 357 Does Not Apply to Highway Rights of Way Across Indian Lands Because That Subject Is Governed by Another, More Specific Provision of the Same Statute.

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Appropriations Act. 31 Stat. 1058, 1084, reproduced *supra* at 4. It was adopted as a floor amendment during the Senate debate.

34 Cong. Rec. 1448 (1901).[1] Section 4 of that same Act, 25 U.S.C. 311, authorizes the Secretary of the Interior

> to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation.

There is no doubt that the City of Anchorage can apply for a highway right of way through the Tabbytite allotment pursuant to Section 311. The question here is whether Section 357 provides an alternate vehicle for obtaining the same right of way without the Secretary's permission. This issue was presented and argued in *Minnesota* v. *United States,* 305 U.S. 382 (1939), but was expressly left open. 305 U.S. at 391.

Section 311 authorizes, but does not direct, the Secretary of the Interior to grant permission to state or local authorities to use allotted Indian lands for public highways "upon compliance with such requirements as he may deem necessary." The Secretary is charged with fiduciary obligations in administering allotted lands "for the sole use and benefit" of the Indian owners. 25 U.S.C. 348; *United States* v. *Mason,* 412 U.S. 391, 398 (1973); *United States* v. *Rickert,* 188 U.S. 432, 442-443 (1903). Consequently, in imposing requirements on the grant of highway rights of way, the Secretary is obli-

[1] The sparse legislative history does not illuminate any of the issues in this case.

gated to protect the interests of the Indian allottee to the maximum possible extent. If state and local authorities have the option of condemning highway rights of way pursuant to Section 357, the protection provisions afforded Indian allottees by Section 311 would be entirely defeated.

1. The canons of statutory construction support the exclusivity of the Section 311 procedure.

Several canons of statutory construction lead to the conclusion that Section 311 governs the grant of highway rights of way to the exclusion of Section 357.

First, this is a classic case for the application of that "eminently sound and vital canon that statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County,* 426 U.S. 373, 392 (1976).[2] The 1901 Indian Appropriations Act is ambiguous on its face. Section 311 can be construed as either the exclusive, or an alternative, means of acquiring highway rights of way across allotted Indian lands. In the absence of any relevant legislative history, the rule that ambiguities must be resolved in the Indians' favor is controlling.

Second, Section 311 is obviously the more specific provision, since it applies only to grants of rights of way across allotted lands to state or local authorities for public highways, whereas Section 357 permits condemnation of allotted lands "for any public purpose."

[2] This canon has equal force whether the beneficiaries of the statute are Indian tribes, Indian allottees or tribal members. Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); Choate v. Trapp, 224 U.S. 665, 675 (1912). *See also* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976).

In these circumstances effect must be given to the more specific part of the statute.

> However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'

MacEvoy v. *United States,* 322 U.S. 102, 107 (1944), quoting *D. Ginsberg and Son* v. *Popkin,* 285 U.S. 204, 208 (1932). *See also Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974) ("Where there is no clear indication otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.")[3]

If Section 357 is construed as an alternate means of obtaining highway rights of way across allotted Indian lands, Section 311 would be made insignificant in contravention of a third canon. *See, e.g., United States* v. *Campos-Serrano,* 404 U.S. 293, 301 and n.14 (1971). ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")

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[3] Although Section 311 is the more specific statute because it is limited to rights of way for highways, Sections 311 and 357 are otherwise co-extensive. Section 311 authorizes the grant of permission "to the proper State or local authorities for the opening and establishment of public highways . . . ." It does not authorize rights of way for private roads, nor does it empower the Secretary to grant permission to nongovernmental entities to open and establish public highways. In these latter respects, Sections 311 and 357 are identical in scope because 357 authorizes condemnation of allotted lands for public purposes by entities clothed with the power of eminent domain under state law.

In exercising his powers under Section 311, in some instances the Secretary might require that the highway be located near the allotment's boundaries so as to minimize interference; in others it might be to the allottees' advantage to locate the highway to maximize access.[4] These and other matters, such as the design and width of the highway, were left to the Secretary's judgment. But if the highway right of way can be obtained by judicial condemnation, the delegation of power to the Secretary would be obviated. Similarly, several protective provisions of the first paragraph of Section 3 of the 1901 Indian Appropriations Act, 25 U.S.C. 319, reproduced *supra* at 2-3, which authorizes secretarial grants of rights of way across tribal and allotted lands for telephone and telegraph lines, would be rendered insignificant if those same interests could be obtained pursuant to Section 357.

Fourth, this Court has consistently construed Indian statutes in a manner that gives full effect to their protective purposes. *Wilson* v. *Omaha Indian Tribe,* —— U.S. ——, ——, 99 S. Ct. 2529, 2537, 61 L.Ed.2d 153, 166 (1979); *Smith* v. *McCullough,* 270 U.S. 456, 464-65 (1926) ("The purpose of the restrictions was to give the needed protection, and they should be construed in keeping with that purpose.")[5]

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[4] *See* Supplemental Memorandum of the United States in Minnesota v. United States at 9, cited and discussed *infra* at 15, for one instance in which a proposed highway was relocated after Interior officials expressed "considerable objection" to the originally planned location.

[5] There is no explanation in the legislative history of why Congress accorded different treatment to rights of way for highways and telephone and telegraph lines than uses of allotted lands for other public purposes. Possible reasons for this disparate treatment are readily apparent, however. Rights of way for highways and

Fifth, as stated in *Morton* v. *Mancari, supra,* 417 U.S. at 551:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

The way to give effect to both statutes is by holding that Section 311 applies to the acquisition of highway rights of way across allotted Indian lands while Section 357 governs the acquisition of Indian allotted lands for public purposes not covered by more specific laws. *Morton* v. *Mancari, supra,* reached a similar result, giving effect to a specific statute granting an employment preference to Indians in the Indian Service while construing a general provision prohibiting discrimination by the government to apply to the employment of Indians by other government agencies.

2. Prior administrative practice and construction are not of much assistance.

The Interior Department's administration of Sections 311 and 357 has not been consistent. In the litigation that culminated in *Minnesota* v. *United States,* 305 U.S. 382 (1939), the United States took the position

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telephone and telegraph lines were probably among the most common purposes for which interests in allotted Indian lands were sought. (Railroad rights of way were covered by a prior, specific 1899 enactment, 30 Stat. 990, 25 U.S.C. 312-318, and a subsequent 1904 Act, 33 Stat. 65, 25 U.S.C. 321, authorizes secretarial grants of rights of way for oil and gas pipelines.) They are also the kinds of uses of allotted lands for public purposes that most require, and lend themselves to, protective conditions relating to their location and design. This is especially true of highways.

that highway rights of way across allotted lands could not be obtained absent compliance with Section 311. *See* United States' Brief in Opposition to Certiorari at 7-8; and Brief of the United States at 18-19, *Minnesota* v. *United States,* O.T. 1938, No. 73. Solicitor General Robert H. Jackson argued, *inter alia,* that applying the Section 357 condemnation procedure to highway rights of way across allotted lands would render Section 311 "self-contradictory" and "largely inoperative." Brief in Opposition to Certiorari, *supra,* at 8.

During oral argument in that case, this Court specifically asked to be advised about the administrative practice of the Interior Department concerning condemnation of allotted Indian lands for highway purposes. In response, the Solicitor General filed a Supplemental Memorandum, which included a detailed summary prepared by the Interior Department of its prior practice with regard to highway rights of way across allotted lands. Two instances were reported in which state or local authorities were advised that highway rights of way were governed by Section 311 and could not be obtained without the Secretary's consent. Supplemental Memorandum for the United States, *Minnesota* v. *United States,* O.T. 1938, No. 73, at 7 and 8. Several other situations were described in which highway rights of way were eventually obtained pursuant to Section 311 after condemnation actions had been contemplated or actually filed.

On the other hand, the Interior Solicitor concluded in a 1923 opinion that Section 357 and various statutes authorizing secretarial grants of rights of way across allotted lands provided alternate means of acquiring

these rights of way. 49 I.D. 396.[6] Significantly however, while the opinion refers to several such statutes, there is no mention of Section 311 or 25 U.S.C. 319, both of which were included with Section 357 in the 1901 Indian Appropriations Act.

As to more recent times, it is our understanding that the Interior Department altered its prior practice after 1940 to conform with the decision in *United States* v. *Minnesota,* 113 F.2d 770 (8th Cir. 1940), discussed *infra* at n. 9. In that case the court of appeals held that rights of way could be obtained pursuant to either Section 311 or Section 357.

Given this checkered history, prior administrative practice and construction, in and of itself, is not entitled to much consideration. *See* and *compare General Electric Co.* v. *Gilbert,* 429 U.S. 125, 140-43 (1976); and *United States* v. *Oklahoma Gas & Electric Co.,* 318 U.S. 206, 217-18 (1943). To the extent that any deference is owed, the administrative practice described in the Solicitor General's Supplemental Memorandum in *Minnesota* v. *United States, supra,* ranks highest because: (1) it was contemporaneous; (2) it "focused closely on the operative impact" of Sections 311 and 357;[7] (3) its chief competitor, the 1923 Interior Decision, was based on manifestly deficient rea-

[6] This opinion was based in part on the understanding that allotted lands that are held in trust could be condemned even in the absence of express statutory authorization. Minnesota v. United States, 305 U.S. 382 (1939), held to the contrary. The opinion also erroneously assumed that limiting Section 357 to the acquisition of interests in allotted lands for public purposes other than those that are authorized by specific enactments would result in a disfavored repeal by implication. *Compare* Morton v. Mancari, *supra,* 417 U.S. 535; and *see* the discussion *supra* at 14.

[7] *See* Weinberger v. Salfi, 422 U.S. 749, 758 n.6 (1975).

soning;[8] and (4) the more recent practice was adopted to conform with a lower court decision and therefore does not qualify as an administrative determination.

3. This Court's decision in *United States* v. *Oklahoma Gas & Electric Co.* supports the inapplicability of Section 357 to the acquisition of highway rights of way.

As previously noted, whether highway rights of way can be obtained by condemnation pursuant to Section 357 was presented, but left open, in *Minnesota* v. *United States,* 305 U.S. 382, 391 (1939).[9] Although the issue was not directly presented four years later in *United*

[8] *See,* note 6, *supra*; and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), quoted and followed in General Electric Co. v. Gilbert, *supra,* 429 U.S. at 141-42.

[9] In that case, the Court of Appeals for the Eighth Circuit had upheld the government's position that "[w]hen . . . Section 357 is read in connection with its context, the rest of Section 3 [of the Act of March 3, 1901], 25 U.S.C.A. § 319, it becomes apparent that the provision does not and was not intended to conflict with or to withdraw the conditions laid down in section 4 of the act [25 U.S.C. 311], upon which the United States consented to proceedings to open up highways through allotted Indian lands." United States v. Minnesota, 95 F.2d 468, 472 (8th Cir. 1939).

After this Court affirmed that decision on other grounds leaving this issue open, an identical case involving another allotment came to the same court and the Eighth Circuit reversed itself. United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940). In this decision, the court of appeals stated that it had previously been misled by the government's reliance on a Fourth Circuit decision which, as subsequently admitted by the United States, involved tribal rather than allotted lands. The Court also relied on administrative statements and regulations. But these did not "focus closely on the operative impact" of Sections 311 and 357. Weinberger v. Salfi, 422 U.S. 749, 758 n.6 (1975). The Court ignored the specific administrative practice summarized in the Solicitor General's Supplemental Memorandum to the Supreme Court in Minnesota v. United States. *See supra* at 15. There was no mention of the rule that a specific provision of a statute will not be nullified or controlled by

States v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), the reasoning of that decision supports the position that Section 311 is the exclusive means of obtaining highway rights of way through allotted lands.

In *Oklahoma Gas & Electric Company*, the issue was whether the company's use of Indian allotted land for an electric service line constituted a trespass. The Secretary had granted a right of way across the allotment for a highway to the State of Oklahoma pursuant to Section 311, and the electric service line occupied land within the highway right of way with the State's permission. Section 311 expressly makes highway rights of way subject to state law. The Court held that the use of a highway right of way for an electric service line was permitted by state law, did not conflict with any federal policies, and therefore did not constitute a trespass.

The United States claimed that the right of way for the electric line across the allotted land was governed by two other statutes, 43 U.S.C. 959 and 961, which authorize secretarial grants of rights of way for electric lines across "reservations." Neither statute mentions Indian allotted lands. The Court held that these two statutes were not intended to govern rights of way over the allotted land involved in that case.

In reaching this conclusion, the Court noted that one of the right of way statutes, 43 U.S.C. 959, made tele-

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a general one or of the canon requiring that ambiguities be resolved in favor of Indians.

United States v. Minnesota, *supra*, 113 F.2d 770, was followed *in dictum* United States v. Oklahoma Gas & Electric Co., 127 F.2d 349-354 (10th Cir. 1942), *affirmed on other grounds*, 318 U.S. 206 (1943).

graph or telephone companies which availed themselves of the Act subject to rates set by the Postmaster General and also made all of the companies' property subject to purchase by the government at a value ascertained by a specific appraisal procedure. The Court held that the evident purpose of this proviso seemed to indicate that the statute was not intended to apply to allotted lands. This conclusion was reinforced by the condemnation statute, Section 357, because, the Court reasoned, if 43 U.S.C. 959 was intended to apply to allotted lands, that intent "was defeated by giving an option to obtain the same rights by condemnation under state law [pursuant to Section 357] free of [the] restrictions [in Section 959]." 318 U.S. at 214.

Seen in context, the Court's reliance on Section 357 supports the position that Section 311, not Section 357, governs highway rights of way over allotted lands. Section 311, unlike 43 U.S.C. 959, expressly applies to allotted lands. It also makes rights of way granted by the Secretary subject to "compliance with such requirements as he may deem necessary." In this latter respect, it is like 43 U.S.C. 959 in that it authorizes the imposition of conditions on the right of way that would be "defeated" if the same rights could be obtained by condemnation under state law free of such restrictions. *Oklahoma Gas & Electric Company* recognizes the incompatibility between a statute authorizing the Secretary to grant rights of way subject to restrictive conditions and a statute authorizing the acquisition of the same interest by condemnation free of conditions. In *Oklahoma Gas & Electric Company*, this reasoning led to the conclusion that 43 U.S.C. 959 does not apply to all allotted lands because allotted lands are not mentioned. In this case, the same reasoning leads

to the conclusion that highway rights of way across allotted lands are governed by Section 311 because allotted lands are expressly covered.[10]

B. The 1948 Right of Way Statute Precludes Acquisition of Rights of Way Through Allotted Lands by Condemnation.

In 1948, Congress enacted a comprehensive statute authorizing secretarial grants of rights of way "for all purposes . . . over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes . . . ." Section 1 of the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. 323, reproduced in full *supra* at 4-6. Like Section 311, the grant of rights of way is "subject to such conditions as [the Secretary of the Interior] may impose . . . ." *Id.* Section 2 of that Act, 25 U.S.C. 324, requires "the consent of the proper tribal officials" with regard to rights of way over and across any tribal lands belonging to Indian tribes organized under certain specified statutes. With regard to allotted lands, Section 324 provides:

> Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.[11]

[10] The foregoing discussion is based on the law as it existed prior to the enactment of 25 U.S.C. 323 *et seq.* in 1948. *See, infra* at n.13.

Section 3 of the 1948 Act, 25 U.S.C. 325, requires "the payment of such compensation as the Secretary of the Interior shall determine to be just." Section 4, 25 U.S.C. 326, provides that nothing in the Act shall "amend or repeal" the Federal Water Power Act, "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Section 5, 25 U.S.C. 327, authorizes the Secretary to grant rights of the way for the use of the United States, subject to the terms of the Act, upon application of other federal agencies. Section 6, 25 U.S.C. 328, empowers the Secretary to prescribe any necessary regulations for the purpose of implementing the Act.

1. The canons of statutory construction and *United States* v. *Oklahoma Gas & Electric Co.* support the exclusivity of the Section 323 *et seq.* procedures for the acquisition of rights of way across allotted lands.

Sections 323 *et seq.* were intended to provide "simplification and uniformity in the administration [of grants of rights of way for any purpose over individually and tribally owned land]." S.Rept. No. 823, 80th Cong. 2d Sess. 3 (1948). The highway right of way over the

[11] The necessity for obtaining the consent of the Indian allottee, except in specifically enumerated circumstances which are not present in this case, is also embodied in the Secretary's implementing regulations. 25 C.F.R. 161.3(b) and (c).

Tabbytite allotment is governed by this statute to the exclusion of Section 357 for all of the reasons urged in Part I-A. Sections 323 *et seq.*, like Section 311, are more specific than Section 357 because they apply only to rights of way, while Section 357 authorizes condemnation for any public purpose. Several provisions of Sections 323 *et seq.* would be rendered insignificant if highway rights of way could be obtained by condemnation pursuant to Section 357. These provisions include the Secretary's powers to prescribe conditions, to determine just compensation, and to promulgate regulations; the allottees' right to withhold consent; and the Secretary's power to grant rights of way without the allottees' consent if he finds that the grant will cause no substantial injury to the land or any owner thereof. Effect can be given to both Sections 323 *et seq.* and Section 357 by limiting Section 357 to the acquisition of all interests in allotted lands other than rights of way. Any doubts about the relationship between the two statutes should be resolved in favor of the Indians and in a manner that fully effectuates the protective purpose of Sections 323 *et seq.* And the reasoning of *United States* v. *Oklahoma Gas & Electric Co., supra,* supports the conclusion that Section 357 should not be construed in a manner that permits Sections 323 *et seq.* to be circumvented. Several of these grounds were relied upon in *Plains Electric Generation and Transmission Cooperative, Inc.* v. *Pueblo of Laguna,* 542 F.2d 1375 (10th Cir. 1976), in support of the holding that a 1926 statute authorizing the condemnation of Pueblo Indian lands was impliedly limited by Sec-

tions 323 *et seq.* so as to exclude the acquisition of rights of way.[12]

2. Section 357 was not saved from repeal by the 1948 Indian Right of Way Act.

When Congress enacted Sections 323 *et seq.* it was aware of the existence of other laws authorizing the acquisition of rights of way across Indian lands. Section 4 of the Act, 25 U.S.C. 326, addresses the relationship between Sections 323 *et seq.* and those other acts. It provides that the Act "shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 . . . nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Under the rule of statutory construction known as *expressio unis est exclusio alterius,* the omission of any reference to Section 357 in Section 326 is an indication that Congress did not intend to save Section 357 from repeal insofar as the acquisition of rights of way over allotted lands is concerned. *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 188 (1978); *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers,* 414 U.S. 453, 458 (1974); and *Plains Electric Generation and Transmission Coopera-*

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[12] In Nicodemus v. Washington Power Co., 264 F.2d 614, 618 (9th Cir. 1959), the Ninth Circuit followed United States v. Minnesota, *supra,* 113 F.2d 770, in holding that Sections 323 *et seq.* and Section 357 "offer two methods for the acquisition of an easement across allotted Indian lands." The result and reasoning of the *Plains Electric* case are plainly at odds with these prior decisions.

A subsequent Tenth Circuit decision, Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1153 (1977), cites Nicodemus with approval *in dictum* without mentioning Plains Electric.

tive, Inc. v. *Pueblo of Laguna, supra,* 542 F.2d at 1380.[13] There is no contrary indication of legislative intent.[14]

3. Indian statutes of ongoing applicability should be construed so as to effectuate current congressional policies.

In the 47 years between the enactment of Section 357 and Sections 323 *et seq.*, federal Indian policy underwent radical changes. Not surprisingly, the two statutes

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[13] Section 326 also provides guidance in interpreting the relationship between the 1948 statute and prior laws authorizing the Secretary to grant rights of way for specific purposes such as Section 311. Section 326 distinguishes between the Federal Water Power Act and statutes empowering the Secretary to grant rights of way. Nothing in the 1948 statute "amends or repeals" the provisions of the Federal Water Power Act, while the other statutes authorizing secretarial grants of rights of way are saved only from "repeal." The alteration of statutes like Section 311 by the provisions of the 1948 Act is therefore permitted. As applied to this case, this means that Section 324 amends Section 311 by requiring Tabbytite's consent. *See* the Interior Department's June 19, 1978 Decision, reproduced as Appendix A to this Brief, at 3a-5a.

[14] In commenting on the proposed bill, the Interior Department stated: "Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands." S.Rep. No. 823, 80th Cong. 2d Sess. 4 (1948). Section 5 of the proposed bill is identical with Section 327. It authorizes the grant of rights of way for the use of the United States under Sections 323 *et seq.* upon application of other federal agencies. It does not authorize judicial condemnation. Interior may have used the term "condemnation" loosely to refer to procedures authorizing administrative conveyances of rights of way across Indian lands. Section 327 does broaden the Secretary's existing powers by permitting grants of rights of way over Indian lands to federal agencies in addition to, for example, "the proper state or local authorities" referred to in Section 311.

There is no mention of Section 357 in the legislative history or any indication that rights of way across allotted lands for highways or other purposes could be obtained by condemnation before or after the enactment of Sections 323 *et seq.*

implement different and conflicting objectives. In such circumstances, the Court should construe the statutes in a manner that effectuates current congressional policies. That means that acquisition of rights of way across allotted Indian lands should be governed exclusively by Sections 323 *et seq.*

In 1901, prevailing federal Indian policy was manifested in the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* The objects of the allotment policy "were to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 650 n.1 (1976). *See also Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973); and Cohen, *Handbook of Federal Indian Law* 206-210 (1942). Allotted lands were to remain in trust for 25 years, 25 U.S.C. 348, after which "every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U.S.C. 349. When seen in context as part of the entire allotment program, Section 357 simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period.[15]

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[15] By 1900, more than 60,000 allotments, approximately 5,500,000 acres, had been approved and the process was slowing down. Cohen, Handbook of Federal Indian Law 210-211 (1942). The majority of these allotments were approved prior to 1892. *Id.* Thus, in 1901, the foreseeable impact of Section 357 was to make state condemnation laws applicable to most Indian allotments 10 to 15 years earlier than scheduled under the General Allotment Act.

The allotment policy proved disastrous[16] "and was repudiated in 1934 by the Indian Reorganization Act [IRA], 48 Stat. 984, now amended and codified as 25 U.S.C. §§ 461 *et seq.*" *Mattz* v. *Arnett, supra,* 412 U.S. at 496 n.18, quoted in *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 478-79 (1976). *See also Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 151 (1973) ("Unquestionably, the [Indian Reorganization] Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment.") Section 1 of the IRA, 25 U.S.C. 461, prohibited further allotments. Section 2, 25 U.S.C. 462, extended the existing periods of trust "until otherwise directed by Congress." Section 3, 25 U.S.C. 463 (a), authorized the Secretary to restore remaining, undisposed surplus lands to tribal ownership. Section 4, 25 U.S.C. 464, prohibited any "sale, devise, gift, exchange, or other transfer of restricted Indian lands. . . ." except as provided in the Act.[17] And Section 5, 25 U.S.C. 465, appropriated funds for the acquisition of additional tribal and allotted lands for Indians. While none of these provisions of the Indian Reorganization Act is directly applicable to the Tabbytite allotment, *see* note 17, *supra,* they do demonstrate the extent

[16] Between 1887 and 1934, the allotment process and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. *See* Hearings on H.R. 7902, Committee on Indian Affairs, 73d Cong. 2d Sess. 15-18 (1934).

[17] In Minnesota v. United States, *supra,* 305 U.S. 382, the Solicitor General argued that this provision repealed Section 357. Brief for the United States, Minnesota v. United States, O.T. 1938, No. 73 at 33-36. That issue is not presented in this case because the Tabbytite allotment is not located within the boundaries of any Indian reservation and, under Section 8 of the Indian Reorganization Act, 25 U.S.C. 468, the Act had no effect on such allotments.

to which federal Indian policies changed between 1901 and 1934.

The 1948 Indian Right of Way Act embodies and furthers the policies of the IRA. This is most evident in Section 2 of the 1948 Act, 25 U.S.C. 324. It precludes secretarial grants of rights of way over tribal lands without the consent of tribes organized under the IRA and other related laws.[18] It also requires the allottees' consent for rights of way over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair. These requirements are in keeping with the spirit of the IRA, to "turn . . . over to the Indians a greater control of their own destinies." *Morton* v. *Mancari, supra,* 417 U.S. at 553. They would be nullified if rights of way across allotted lands could be obtained by condemnation pursuant to Section 357.

When recent expressions of Congress' policies toward Indians undermine or are inconsistent with prior laws, this Court has given effect to the subsequent enactment. In *Bryan* v. *Itasca County,* 426 U.S. 373, 386-87 (1976), an act that was a product of the termination era of the 1950s was construed in a manner that

[18] This provision complements Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, which empowers tribes organized under the IRA "to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." Section 16 apparently does not require tribal consent for rights of way across tribal lands granted by the Secretary because Section 3 of the IRA, 25 U.S.C. 463(b)(4), provides that nothing in the Act "shall restrict the granting or use of permits for easements or rights of way. . . ." Section 324 was obviously intended to fill this gap.

was more consistent with the Indian Civil Rights Act of 1968.

Moe v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 477-79 (1976), is even more directly on point. It held that a provision of the 1887 General Allotment Act, 25 U.S.C. 349, which subjects allottees to the civil and criminal laws of the states after issuance of fee patents, had been impliedly repealed as to reservation allotments. The Court noted that Congress had repudiated the allotment policy in 1934 and "by its more modern legislation has evinced a clear intent to eschew any such "checkerboard' approach within an existing Indian Reservation." 425 U.S. at 479. This case is identical in that the allotment policies on which Section 357 was predicated have been repudiated and, by its more recent legislation, i.e. the IRA and the 1948 Right of Way statute, Congress has evinced a clear intent to prevent the alienation or transfer of allotted lands without the consent of the Indian landowners.

In these circumstances, the rules enunciated and followed in ***Bryan*** and ***Moe*** inescapably lead to the conclusion that rights of way across allotted Indian lands are now governed by Section 323 *et seq.* and cannot be acquired by judicial condemnation. As stated in ***Bryan, supra,*** 426 U.S. at 388 n.14:

> [C]ourts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'

Moe carries this rule one step further by holding that current congressional policies should be implemented

even when they result in an otherwise disfavored partial repeal by implication.

It would be most anomalous indeed if the consent of Indian allottees were a prerequisite to grants of rights of way by the Secretary, the Indians' trustee, but rights of way could be obtained by condemnation without the approval of either the Secretary or the allottees.

C. The Relationship Between Sections 311, 323-328 and 357 Present Important and Recurring Issues That Should Be Decided in This Case.

The contention urged in Parts IA and IB, *supra,* that the delegation of power to the Secretary of the Interior to grant highway rights of way across allotted Indian lands precludes the acquisition of such rights of way pursuant to Section 357, are fairly encompassed within the question presented in the Petition for a Writ of Certiorari. For if the right of way cannot be acquired under Section 357 by judicial condemnation, it follows *a fortiori* that it cannot be taken by seizure. Admittedly, these arguments were not made to the lower courts. Nevertheless, the issues are important, likely to recur in this case as well as in future controversies, and overripe; they should be heard and resolved now.[19]

The Court of Appeals for the Ninth Circuit had previously held that rights of way through allotted lands can be acquired either by secretarial grants or by judicial condemnation. *Nicodemus* v. *Washington*

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[19] The decision in Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), all but insures that the issue will be raised in litigation until it is finally determined by this Court.

Power Co., 264 F.2d 614, 618 (1959), following *United States* v. *Minnesota*, 113 F.2d 770 (8th Cir. 1940). It is unlikely that the court of appeals would have reversed itself if the arguments had been made. And this Court does have the benefit of the lower court's resolution of that same issue, albeit in a different case.

More importantly, if this Court reverses the judgment below solely on the grounds urged by the United States, Anchorage could be expected to file an action to condemn Tabbytite's property for its highway. Tabbytite would then defend on the ground that Section 357 is inapplicable, and that Anchorage must comply with the requirements of Sections 311 and 323 *et seq.* In that event, this controversy, which has already raged for more than 20 years and been in litigation for a decade, making its way twice through the court of appeals, would continue on indefinitely.

The questions are important, likely to recur, and were left open by this Court 40 years ago. They should now be resolved, once and for all.

II. TAKING PRIVATE PROPERTY BY SEIZURE IN THESE CIRCUMSTANCES WOULD BE BOTH UNCONSTITUTIONAL AND UNFAIR: SECTION 357 SHOULD BE CONSTRUED TO AVOID THESE RESULTS.

The lower courts held that the highway right of way through the Tabbytite allotment was legally taken as a result of the construction of the road by a private party and the subsequent transfer of the private party's interest in the road to the Municipality of Anchorage. Pet. App. at 1a, 3a, 8a-9a. It is undisputed that the United States and Tabbytite were not notified of any alleged taking when Anchorage took over control and maintenance of the road. On its face, this constitutes a blatant violation of the procedural

due process that is guaranteed by the Fifth and Fourteenth Amendments. *See, e.g. Fuentes* v. *Shevin*, 407 U.S. 67, 80 (1972).[20] Tabbytite therefore answers the question presented in this case in the negative because, *inter alia*, in the circumstances presented here a taking of property by seizure would be unconstitutional.

This Court has twice held that private property owners are entitled to be notified when municipalities invoke their powers of eminent domain. *Schroeder* v. *City of New York*, 371 U.S. 208 (1962); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956). *See also, St. Louis & K. C. Land Co.* v. *Kansas City*, 241 U.S. 419, 427-28 (1916). In *Schroeder, supra*, the municipality argued that the property had been taken by physical occupation, that its use of the property was visible and well-known, that such use was sufficient to constitute the requisite notice, and that the property owner's claim for just compensation was barred by the applicable statute of limitations. *See* 371 U.S. at 213-14; and Brief for Appellee City of New York, *Schroeder* v. *City of New York*, O.T. 1962, No. 75, summarized at 9 L.Ed. 2d 1085. This Court rejected those contentions, holding that physical seizure is not sufficient notice under the Constitution and that personal notice is required.

> [K]nowledge of a change in the appearance of the river is far short of notice that the city had diverted it and that the appellant had a right to be heard on a claim for damages resulting from

[20] Both the Fifth and Fourteenth Amendments are applicable in this case since, under the lower court's theory, the physical seizure and taking of Tabbytite's property by Anchorage was authorized by Congress.

> the diversion. That was the information which the city was constitutionally obliged to make at least a good faith effort to give personally to the appellant—an obligation which the mailing of a single letter would have discharged.

371 U.S. at 214. *Schroeder* therefore stands for the proposition that a property owner cannot be deprived of his right to just compensation by the running of a statute of limitations unless the condemnor provides notice that satisfies due process requirements.

There is no basis for distinguishing governmental takings of private property by physical seizure from other state actions that affect property interests protected by the Due Process clauses of the Fifth and Fourteenth Amendments. Governments are not permitted to replevin personal property, or to terminate welfare benefits, or to suspend driver's licenses, or to garnish wages without providing personal notice and an opportunity to be heard. See *North Georgia Finishing, Inc.* v. *Di-Chem,* 419 U.S. 601 (1975); *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Bell* v. *Burson,* 402 U.S. 535 (1971); and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970). Since these property interests, which are not protected by the Just Compensation clause of the Fifth Amendment, *see e.g., Fuentes* v. *Shevin, supra,* 407 U.S. at 86; *Bell* v. *Burson, supra,* 402 at 535-39, are nevertheless entitled to procedural due process protection, there is no conceivable justification for relegating holders of compensable property rights to an inferior position.

The right to notice and an opportunity to be heard is especially vital where, as here, the applicable condemnation statutes permit property owners to challenge the authority, necessity, and extent of the taking.

See Alas. Stat. 09.55.270, 09.55.280, 09.55.300, 09.55.380, and 09.55.460, reproduced in Appendix B; *Bridges* v. *Alaska Housing Authority,* 349 P.2d 149, 153 (1960); and *Van Dyke* v. *Midnight Sun Mining & Ditch Co.,* 177 F. 85, 87 (9th Cir. 1910). The protection against government overreaching and mistake that is afforded private property owners by these and similar laws and by the initiation of condemnation proceedings is effectively nullified when property is taken by seizure. *Carey* v. *Piphus,* 435 U.S. 247, 259-60 (1978), and cases therein cited, quoted, and discussed; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); and *United States* v. *Winnebago Tribe of Indians,* 542 F.2d 1002 (8th Cir. 1976).

The remedy of "inverse condemnation," by which property owners seek just compensation when governments allegedly invade compensable property rights, is unobjectionable. Indeed it is an implicit part of the Fifth Amendment itself. *Davis* v. *Passman,* —— U.S. ——, 99 S.Ct. 2264, 60 L.Ed. 2d 846 (1979); *Jacobs* v. *United States,* 290 U.S. 13 (1933). Constitutional problems begin when that remedy is transformed into a device by which governments seize and purport to take property without offering just compensation and without providing notice or an opportunity to be heard.

There are occasions when governmental seizures are unavoidable because they are based on a good faith belief that compensable property rights have not been taken. *See e.g., United States* v. *Gerlach Livestock Co.,* 339 U.S. 725, 742-55 (1950); *United States* v. *Causby,* 328 U.S. 256 (1946); *Tempel* v. *United States,* 248 U.S. 1211 (1918). At times, it may be extremely burdensome and expensive to locate everyone who claims

an interest in the property that is to be taken for public purposes. *See, e.g. Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317-18 (1950). The Constitution does not mandate the impossible, or even the extraordinary; nothing more than "good faith" or "reasonable" efforts are required. *Schroeder* v. *City of New York, supra,* 371 U.S. at 214; *Walker* v. *City of Hutchinson, supra,* 352 U.S. at 115-16; *Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 313-14 and 319.

No such difficulties or complications are present in this case. Tabbytite's interest in her allotment is clearly compensable; Section 357 itself requires payment of the money awarded as damages in the condemnation proceeding to be paid to the allottee. There is nothing esoteric about the property right involved in this case; the use of private land for a public road is a classic Fifth Amendment taking.[21] Everyone connected with this road has had personal knowledge of Tabbytite's interest since 1958 and the matter has been in litigation since 1969. Pet. App. at 12a-13a.

There is no conceivable excuse for the failure or refusal to provide notice and an opportunity to be heard under these circumstances. To be sure, governments may at times have a pressing need to take immediate possession of private property. It is also true that due process procedures are not inflexible and must take into account both the governmental function involved and the private interests protected by official

[21] While Anchorage's predecessors had claimed that they enjoyed an easement of necessity across Tabbytite's allotment, that issue had been resolved in favor of Tabbytite and the United States prior to Anchorage's first appearance in this case. *See* Brief in Opposition to Certiorari at 3-4.

action. *Fusari* v. *Steinberg,* 419 U.S. 379, 389 (1975); *Wolff* v. *McDonnell,* 418 U.S. 539, 560 (1974). But here the private interests are compensable property rights, one of the most basic foundations of our way of life. And while some public uses of private property are undoubtedly critically important as well as urgent, fortunately there are well-known and often utilized judicial procedures by which governments can lawfully acquire immediate possession of real property while fully recognizing and respecting the right to notice and an opportunity to be heard.

These procedures provide, in general, for the filing of a declaration of taking, the deposit into court of the estimated compensation, and the transfer of possession to the condemning entity upon terms and conditions that are fixed by the court. *See* 40 U.S.C. 258a-258e; Alas. Stat. 90.55.380-09.55.460, reproduced in Appendix B. They are designed to reconcile the rights of property owners to due process and just compensation with governments' need to avoid delay in acquiring necessary property. They would be rendered superfluous if property can be seized and occupied by governments at any time without so much as the filing of a complaint or the mailing of a letter.[22] And they

[22] The Alaska procedures are especially meticulous. They provide in some instances not only for notice prior to transfer of possession, but also for hearing. Alas. Stat. 09.55.390. In those situations, the court is required to make a finding "that urgent public necessity requires" the transfer of possession. *Id.* Municipalities are specifically authorized to utilize the declaration of taking procedure when exercising their powers of eminent domain for streets or highhighways. Alas. Stat. 09.55.420. The declarations must contain, *inter alia,* a description of the property and a statement of the estate or interest to be taken, statements of the public use for which it is taken and of the authority under which it is taken, and a map or plat showing its location. Alas. Stat. 09.55.430. Title vests and

demonstrate that absent unusual or exceptional circumstances, governments can, and are expected to, provide notice and seek and obtain court permission before acquiring possession of private property.

In the factual setting presented here, the taking of Tabbytite's property by physical seizure would be unconstitutional. To avoid the constitutional issue, the Court should hold that Section 357 does not authorize Anchorage to take Tabbytite's land without initiating

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compensation is determined as of the date of the filing of the declaration. Alas. Stat. 09.55.440, but "the right of entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking." Alas. Stat. 09.55.450. After the filing of the declaration and the deposit of the estimated compensation and the running of the time to file an objection, "the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surender possession . . ." *Id.* And the court may even divest the plaintiff of title acquired under the declaration of taking procedure where it "finds that the property was not taken for a public use." Alas. Stat. 09.55.460. The Alaska Supreme Court appears to take these requirements and limitations seriously. Bridges v. Alaska Housing Authority, 349 P.2d 149 (1960). *See also* Russian Orthodox Greek Catholic Church of North America v. Alaska State Housing Authority, 498 P.2d 737 (Alas. 1972); and 1967 Op. Atty. Gen. (Alas.) No. 2, discussed and quoted in the Brief for the United States at 15-16. *But see* ARCO Pipeline Co. v. 3.60 Acres, More or Less, 539 P.2d 64 (Alas. 1975).

The formalities of the declaration of taking procedure are also a significant safeguard against careless or unauthorized invasions of compensable property rights by officials who have not been delegated, or are not properly exercising, the power of eminent domain. The likelihood of such occurrences is reduced by the detailed information that must be contained in the declaration, the opportunity for supervision and control by superior officials and government attorneys, and the necessity of depositing government funds with the court.

a condemnation action. *Wilson* v. *Omaha Indian Tribe,* —— U.S. ——, ——, 99 S.Ct. 2529, 2544, 61 L.Ed. 2d 153, 174-175 (1979) (Blackmun, J., concurring); *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 499-500 (1979); *Lorillard* v. *Pons,* 434 U.S. 575, 577 (1978); *Regional Rail Reorganization Cases,* 419 U.S. 102, 134 (1974).[23]

In addition to the constitutional dimension, the process by which governments "seize [private property] and say 'sue me', is high-handed government conduct and not to be favored." *United States* v. *Herrero,* 416 F.2d 945, 947 (9th Cir. 1969), *cert. denied,* 397 U.S. 973.[24] Disregarding its own advice, the decision of the court of appeals in this case provides substantial incentives for governments to take private property by physical seizure. *See* Brief for the United States at 17 and 19-23. By contrast, decisions of this Court in cases such as *United States* v. *Dickinson,* 331 U.S. 745 (1947), and *Jacobs* v. *United States,* 290 U.S. 13 (1933), have the opposite effect and, as noted by the United States in its Brief at 14-15, recent congressional policy encourages federal agencies to acquire property through condemnation proceedings rather than by seizure.

In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 70 n.30 (1978), the Court relied on the "overriding duty of our Federal Government to deal fairly with Indians" in finding that Congress did not intend to create

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[23] Holding that the acquisition of the highway right of way is governed by Sections 311 and 323-328 as urged in Part I of this Brief also avoids the constitutional issues raised by takings by seizure.

[24] In its first opinion in this case, the court of appeals used the identical word, "high-handed," to characterize the original occupation of Tabbytite's land by respondent Clarke. Pet. App. at 15a.

a cause of action against tribal officials when the Indians had not had an opportunity to present their views. *See also Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). It is even more difficult to attribute to Congress an intent to authorize the seizure of Indian property without providing for notice or an opportunity to be heard.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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November 1979.

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

June 19, 1978

CERTIFIED-RETURN RECEIPT REQUESTED
Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Mr. Larry W. Telford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. § 312, et seq). The application is for a 60-foot width, 10.89 miles in length, across

tribally-owned land. On May 4, 1977, the Agency Superintendent returned the application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 5, 1948 (25 U.S.C. 323), and that, among other things, the application " . . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and telegraph lines should be submitted separately.

On May 27, appellant filed an appeal with the area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and congressional policy. Therefore, waiver of the consent requirement would constitute an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in *praesenti* grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying

the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. §476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. (See also 1948 U.S. Code Cong. Service, p. 1033.)

That Congress fully understood and intended such a policy is clear from a 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st

Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

> "We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.
>
> For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."
>
> (Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of § 324. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . . ." That counters the inference that § 326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

Also, § 326 must be read together with other sections of the same Act. While § 325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of- way, § 324 categorically and unequivocally states

that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 embraces rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not *repealed.* In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1899 right-of-way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgement of the application of § 324 to all rights-of- way granted after 1948.

Due Process

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to " . . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a) No right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise his discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

Moreover, estoppel is not applicable to the situation at hand. The case of *United States* v. *Wharton*, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Morever, the *Wharton* decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the *Wharton* case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage—the loss of control over their lands and the inability to participate in the determination of how much they should be compensated for such use.

In addition, several cases cited in the *Wharton* decision indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretations of Department regulations). *Shuster* v. *C.I.R.*, 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application of a current federal requirement. *Indeed,* if estoppel did not bar the United States from obtaining a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that passenger terminals be provided. We think that these points can be worked out in conjunction with the agency when appellant submits its amended right-of-way application.

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent—whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary

is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

Assistant Secretary—Indian Affairs
/s/ FORREST J. GERARD
Forrest J. Gerard

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APPENDIX B

Pertinent Condemnation Provisions of Alaska Statutes and United States Code

1. Alaska Statute 09.55.270 provides:

Prerequisites. Before property can be taken, it shall appear that

(1) the use to which it is to be applied is a use authorized by law;

(2) the taking is necessary to the use;

(3) if already appropriated to a public use, the public use to which it is to be applied is a more necessary public use.

2. Alaska Statute 09.55.280 provides:

Entry upon land. In all cases where land is required for public use, the state, the public entity, or persons having the authority to condemn, or its agents in charge of the use may enter upon the land and make examination, surveys, and maps and locate the boundaries; but it shall be located in the manner which will be most compatible with the greatest public good and the least private injury, and subject to the provisions of § 300 of this chapter. The entry shall constitute no cause of action in favor of the owners of the land except for injuries resulting from negligence, wantonness, or malice.

3. Alaska Statute 09.55.300 provides:

Powers of court. (a) The court has power

(1) to regulate and determine the place and manner of making the connections and crossings or of enjoying the common uses mentioned in § 260(5) of this chapter, and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by law;

(2) to limit the amount of property sought to be condemned if, in its opinion, the quantity sought to be condemned is not necessary.

(b) If the court determines that the property is to be taken for a public use, and if all parties to the action do not object, the court shall appoint a master to determine the amount to be paid by the plaintiffs to each owner or other person interested in the property as compensation and damages by reason of the appropriation of the property. If all parties to the action object to the appointment of a master the court shall proceed with a jury trial, unless the jury is waived by all parties to the action.

4. Alaska Statute 09.55.330 provides:

Compensation and damages. For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the basis of damages to property not actually taken but injuriously affected in the cases where the damages are allowed. If an order is made letting the plaintiff into possession, as provided in § 380 of this chapter, the compensation and damages awarded shall draw lawful interest from the date of the order. No improvements put upon the property after the date of the service of summons shall be included in the assessment of compensation or damages.

5. Alaska Statute 09.55.380 provides in pertinent part:

Order authorizing plaintiff to continue in or take possession. Upon application of the plaintiff at any time after the jury's verdict has been returned or the master's report has been filed in the court, the court may make an order that, upon payment into court of the amount of damages assessed in the report or by the jury, the plaintiff, if already in possession of the property sought to be con-

demned, may continue in possession and, if not in possession, the court may authorize the plaintiff to take possession of the property and use and possess it until the final conclusion of the proceedings, and that all actions and proceedings against the plaintiff on that account be stayed until that time. However, where an appeal is taken by the defendant, the court may also require the plaintiff to give a bond or undertaking with sufficient sureties before continuing or taking possession. The bond or undertaking shall be approved by the court and shall be in the sum the court may direct, and conditioned to pay defendant any additional damages and costs given by the judgment over and above the amount assessed, and the damages which defendant sustains if the property is not taken for public uses . . . .

6. Alaska Statute 09.55.390 provides:

Acquisition of easements and additional powers of the court to require surrender of possession to plaintiff. The right to take possession under this section is in addition to any other right to take possession provided in §§ 240-460 of this chapter. In proceedings for the acquisition of easements for the transmission and distribution of electric energy, communications, water, steam, and gas, the court may, upon motion and after a hearing, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the plaintiff. If the court finds that urgent public necessity requires, it may grant the plaintiff possession at any time after the action has been commenced. Notice of the hearing shall be as provided in in the Rules of Civil Procedure, except that, where service by publication is required, notice may be given at any time following the date of the last publication by registered mail addressed to the defendant and to parties in possession at their last-known addresses as shown on the latest tax roll of the political subdivision in which the premises are located or as indicated by other evidence which shall be satisfactory to the court.

7. Alaska Statute 09.55.400 provides:

Deposit into court of estimated compensation and damages. The order given under § 390 of this chapter requiring the parties in possession to surrender possession to the plaintiff shall require that the plaintiff deposit with the clerk of the court an amount of money determined by the court fairly to represent the estimated compensation and the estimated damages to the defendant and for the speedy occupation, including reasonable relocation costs if required. In addition the court shall include in its order a further requirement that the plaintiff execute and file with the clerk of the court a bond, approved as to form and as to sufficiency of the sureties by the court, in an amount equal to the amount of money required to be deposited, conditioned upon payment to the defendant of additional damages and costs found to be due to the defendant in the action. No costs or attorney fees shall be assessed against the defendant in an action brought under § 390 of this chapter.

8. Alaska Statute 09.55.420 provides:

Declaration of taking by state or municipality. (a) Where a proceeding is instituted under §§ 240-460 of this chapter by the state, it may file a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. Where a proceeding is instituted under §§ 240-460 of this chapter by a municipality in the exercise of eminent domain for street or highway, off-street automobile parking facilities, school, sewer, water, telephone, electric, other utility, and slum clearance purposes or use granted to cities of the first class, the governing body of the municipality may exercise the power through the filing of a declaration of taking with the complaint or at any time after the filing of the complaint, but before judgment. The declaration of taking procedure may not be used with relation to the property of rural electrification or telephone cooperatives or nonprofit associations receiving financial assistance from the federal government under the Rural Electrification Act; provided that no declaration of taking for off-street parking purposes may be used unless there has been public notice by publication in a newspaper of general circulation in the area for not less than once a week for four consecutive weeks followed by a full and complete public hearing held before the governing body of the first class city or municipality.

(b) Notwithstanding the provisions of (a) of this section, until July 1, 1975, a home rule city of over 50,000 population may exercise the power of declaration of taking under § 240(c) of this chapter. When the home rule city exercises this power for the United States government, the just compensation paid for the property shall include all relocation and other costs to the extent required by the Uniform Relocation Assistance and Real Property Acquisition Act of 1970.

9. Alaska Statute 09.55.430 provides:

Contents of declaration of taking. The declaration of taking shall contain

(1) a statement of the authority under which the property or an interest in it is taken;

(2) a statement of the public use for which the property or an interest in it is taken;

(3) a description of the property sufficient for the identification of it;

(4) a statement of the estate or interest in the property;

(5) a map or plat showing the location of the property;

(6) a statement of the amount of money estimated by the plaintiff to be just compensation for the property or the interest in it.

10. Alaska Statute 09.55.440 provides:

Vesting of title and compensation. (a) Upon the filing of the declaration of taking and the deposit with the court of the amount of the estimated compensation stated in the declaration, title to the estate as specified in the declaration vests in the plaintiff, and that property is condemned and taken for the use of the plaintiff, and the right to just compensation for it vests in the persons entitled to it. The compensation shall be ascertained and awarded in the proceeding and established by judgment. The judgment shall include interest at the rate of six per cent per year on the amount finally awarded which exceeds the amount paid into court under the declaration of taking. The interest runs from the date title vests to the date of payment of the judgment.

(b) Upon motion of a party in interest and notice to all parties, the court may order that the money deposited or a part of it be paid immediately to the person or persons entitled to it for or on account of the just compensation to be awarded in the proceedings. If the compensation finally awarded exceeds the amount of money deposited, the deposit shall be offset against the award. If the compensation finally awarded is less than the amount of money deposited, the court shall enter judgment in favor of the plaintiff and against the proper parties for the amount of the excess.

11. Alaska Statute 09.55.450 provides:

Right of entry and possession. (a) Upon the filing of the declaration of taking and the deposit of the estimated compensation, the court may, upon motion, fix the time during which and the terms upon which the parties in possession are required to surrender possession to the petitioner. However, the right to entry shall not be granted the plaintiff until after the running of the time for the defendant to file an objection to the declaration of taking. Where the party in possession withdraws any part of the award and

remains in possession, the court may fix a reasonable rental for the premises to be paid by that party to the plaintiff during such possession.

(b) The court may direct the payment of delinquent taxes and special assessments out of the amount determined to be just compensation, and make orders with respect to encumbrances, liens, rents, insurance, and other charges as are just and equitable.

(c) The right to take possession and title in advance of final judgment where a declaration of taking is filed is in addition to any other rights to take possession provided in §§ 240-460 of this chapter.

12. Alaska Statute 09.55.460 provides:

Effect of appeal. (a) No appeal or a bond or undertaking given operates to prevent or delay the vesting of title to real property or the right to possession of it.

(b) The plaintiff may not be divested of a title acquired except where the court finds that the property was not taken for a public use. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for the period during which the property was in the possession of the plaintiff, and (2) recover for the plaintiff any award paid to any person.

13. The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a-258e, provides:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands de-

scribed in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing of said declaration of taking and the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation, shall be ascertained and awarded in said proceeding and established by judgment therein, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the

just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irre-

vocably committed to pay the amount untimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.